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Defamation Outside Reputation: Proposals for the reform of English law

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Abstract

The view that the wrong of defamation protects the interest in reputation, and nothing but that interest, is ordinarily taken for granted in modern English law. It is, however, incorrect. This paper gives four examples of ways in which the English law of defamation has strayed into the protection of other interests, in particular privacy, self-worth and wealth. They are: the supplementary tests of defamatoriness (the ridicule test and the 'shun and avoid' test); s. 8(5) of the Rehabilitation of Offenders Act 1974; the rule that slanders are not ordinarily actionable without proof of 'special damage'; and, finally, the compensation of losses consequential upon the injury to reputation. It is argued that these are all unwarranted and ought to be reformed.

Keywords

Defamation, reputation, English law, law reform

DEFAMATION OUTSIDE REPUTATION:
PROPOSALS FOR THE REFORM OF ENGLISH LAW

Eric Descheemaeker*

I Introduction

[133] This paper starts with one premise and draws four conclusions from it in terms of suggested changes to the English law of defamation.^{1,2} The premise is that defamation, as a wrong, exists to protect the plaintiff's interest in his reputation—'reputation' being used in this context as an ellipsis for *deserved* reputation. The consequences the law should draw from this proposition are that: (a) two of the tests currently used by courts to determine the defamatory character of the words—or, generally, statement—complained of ought to be abolished; (b) s. 8(5) of the Rehabilitation of Offenders Act 1974 should likewise be repealed; (c) the condition that most defamatory statements made in transient form are not actionable unless accompanied by 'special loss' (slanders not actionable *per se*) ought to be removed; and (d) the law of defamation should stop compensating losses other than injuries to reputation which flow from such injury. All four proposals, it is argued, stem directly and as a matter of logic from the acceptance of the above premise.

II The Premise

The examination of the premise starts with a brief exploration of the taxonomy of the law of wrongs (or civil liability).³

* I refer to two of my previous works under the following abbreviations: *DW* = E. Descheemaeker, *The Division of Wrongs: A Historical Comparative Study* (Oxford, 2009); *PR* = E. Descheemaeker, 'Protecting Reputation: Defamation and Negligence', 29 *OJLS* (2009), 603.

¹ Only the civil, not criminal, law of defamation will be considered. The two provinces of the law are analytically distinct and, because they pursue different goals, it is not clear that much can be learnt for the civil law of defamation from its criminal counterpart. This is not to deny that, historically, it has been significantly influenced by it.

² In this paper, 'defamation' will be understood as the reunion of the two causes of action historically known as 'libel' and 'slander'.

³ On these two categories—one using the vantage point of the common law and the other of the civilian tradition—and how they relate to one another, see *DW*, chap. 2.

The Taxonomy of the Law of Wrongs

The mapping of the law of wrongs along the lines of protected interests,⁴ which—even though arguably present—remained implicit in Roman law, was an intellectual breakthrough for which Donellus (Hugues Doneau, 1527—91) and then Grotius (Hugo de Groot, 1583—1645) must be credited.⁵ This classification was shortly imported into the common-law tradition as a means of [134] expositing the law of wrongs, in particular by Blackstone and Hale;⁶ but English law never operated the task, which Donellus and Grotius had carried out in respect of Roman law, of mapping out the various forms of action—which were structuring it—onto these different interests, and the different degrees of blameworthiness (or lack thereof) at which each would be protected. This failure, which was never rectified—not even when the forms of action were abolished—is allegedly one of the principal reasons why the English law of wrongs has remained bogged down in deep analytical muddle to the present day.

The Interest in Reputation

One of the protected interests identified by these authors was *reputation* (called ‘*existimatio*’ by Donellus, ‘*fama*’, ‘*honor*’ or ‘*eer*’ by Grotius, and ‘reputation’ by Hale and Blackstone).⁷ At its simplest, reputation consists in the good esteem in which others hold us. The corresponding interest could, in principle, be protected through a number of different mediums, whether specifically geared at this purpose or not. In the context of English law, there is intuitively a very strong correlation between reputation as an interest and the cause or causes of action known as ‘defamation’ (or, alternatively, ‘slander’ and ‘libel’). The strength of this correlation is such that it is almost invariably assumed in the modern common-law tradition that the bijection between these two legal categories is perfect. Surjectively, Dr McNamara has shown that the view that defamation protects reputation—and, we should

⁴ On the notion of an interest, see *DW*, 27-8; *PR*, 605-6.

⁵ *DW*, 219-21.

⁶ *DW*, 221-4.

⁷ *PR*, 609.

specify, nothing but it—has become ‘axiomatic’ in English cases and literature.⁸ Injectively, it is typically assumed that no other cause of action protects reputation—and, in particular, not the transversal wrong of negligence.⁹

The danger with propositions which are intuitively plausible but are not in fact carefully examined is that they often turn out, on closer examination, to be no more than a rough approximation of the truth. So it is with the bijection between defamation and reputation. It is typically believed to be true; and it ought in my mind to be true; but it is not in fact quite true. This has consequences in terms of the intelligibility and clarity of the law.

Ignoring the protection of reputation through other causes of action,¹⁰ I shall in this paper give *four examples* of the way in which the English law of defamation has historically been stretched beyond its natural boundaries—the protection of (deserved) reputation—to protect other interests, thus becoming in a certain way similar to the wrong of *iniuria* in Roman law; and I shall argue that this is unwarranted and ought to be undone.

III Defamation and Self-worth: the First Supplementary Test of Defamatoriness

Modern English law uses three different (and alternative) tests to determine what counts as ‘defamatory’ for the purposes of the law of defamation. The leading test is that expounded in its modern form by Lord Atkin in *Sim v Stretch*, that the words would ‘tend to lower the plaintiff in the estimation of right-thinking members of society generally’.¹¹ This is not problematic.

The Ridicule Test

There are, however, two supplementary tests which are, for their part, unjustifiable. The first one is the so-called ‘ridicule’ test (traced by Dr McNamara back to *Mason v Jennings*):¹²

⁸ L. McNamara, *Reputation and Defamation* (Oxford, 2007), 1. The proposition that ‘defamation’ is identical with ‘the protection that the common law affords to the interest in reputation’ is also taken as a starting point by the American Restatement of Torts (American Law Institute, *Restatement of the Law (Second): Torts 2d*, vol. 3 (St. Paul [Minn.], 1977), 151).

⁹ *PR*, 619-22.

¹⁰ *PR*, 618-9.

¹¹ [1936] 2 All ER 1237, 1240.

¹² [1680] Raym Sir T 401, 83 ER 209.

[135] a statement will be regarded as defamatory if it exposes the plaintiff to ridicule.¹³ A fundamental problem with this test is that it cannot be said to protect the plaintiff's reputation. It might well be wrong to subject others to words which ridicule or abase them; but this cannot meaningfully be regarded as defamatory. Pointing out that a film director is 'hideous-looking'¹⁴ might be humiliating to him, and injure his self-esteem; but it does not affect his worth, or reputation, in the eyes of others. Here, the wrong of defamation is being used—or, rather, abused—to protect *self-worth*. Ulpian famously stated, in respect of the Roman law of *iniuria*, that the wrong could protect either *corpus* (physical integrity), *fama* (good name, reputation, fame, renown) or *dignitas* (dignity, worth, status, standing).¹⁵ To follow the parallel, English defamation is being stretched here to protect, at least in part, the *dignitary* section of *iniuria*. It is not meant to.¹⁶ Because it does not belong there, the ridicule test ought to be abolished from the law of defamation.¹⁷

IV Defamation and Privacy: the Second Supplementary Test of Defamatoriness and the Rehabilitation of Offenders Act 1974

Defamation, as a cause of action, has also been allowed to extend its scope of protection to another interest, which is privacy. Privacy—famously described by Warren and Brandeis (following Cooley) as the right 'to be let alone',¹⁸ and which might be more specifically defined as the right to control selectively the flow to others of information about oneself—is another aspect of the *dignitas* interest identified by Ulpian.¹⁹ Historically, as is well known, English law has had no cause of action to directly protect privacy. This does not mean that there was no such protection; but the actionability of acts (whether words or not) which unjustifiably violated the plaintiff's privacy was always oblique, through causes of action which did not explicitly aim at protecting that interest. One of them was breach of

¹³ L. McNamara, *op. cit.* (n. 8), chap. 7. Contra J. Burchell, 'The Criteria of Defamation', 91 *SALJ* (1974), 178, 196-7.

¹⁴ *Berkoff v Burchill* [1996] 4 All ER 1008, 1010 (CA).

¹⁵ D.47.10.1.2 (Ulpian, 56 *Edict*).

¹⁶ This proposition stems logically from the above premise. It was explicitly recognised by the New South Wales Law Reform Commission: NSWLRC, *Defamation* (Report 11) (Sydney, 1971), § 5.

¹⁷ On the question whether ridiculing words should be actionable through a *different* cause of action, see below, section 3.

¹⁸ S. D. Warren and L. D. Brandeis, 'The Right to Privacy', 4 *Harvard L. R.* (1890-91), 193, 195. On the distinction between privacy and related interests, see J. Neethling, 'The Concept of Privacy in South African Law', 122 *SALJ* (2005), 18, 19ff.

¹⁹ Above, n. 15.

confidence. Another was malicious falsehood.²⁰ A third was defamation. Sometimes, this was done by stretching the general test of defamatoriness to—or beyond—its breaking point,²¹ but, even though this point is the one most commonly brought up in this context, I will leave it aside because it is concerned with the wrong application of the (right) law of defamation, rather than any defect intrinsic to the law itself. I will, instead, give two examples of the way in which the law of defamation has gone wrong, on the face of the record, because of an unwarranted drift into the protection of privacy.

The 'Shun and Avoid' Test

The first one concerns the second supplementary test of defamatoriness devised by the courts, namely, the 'shun and avoid' test.²² It is under this test that the imputation of such things as shameful diseases or insanity can be actioned in defamation. The problem here is the same as in the previous section, namely, that the actionability of the words is not grounded in any injury to the plaintiff's reputation. If there is anything wrong with trumpeting forth, without justification, sensitive facts about another, it would be because such an act violates the claimant's *privacy*, not his reputation—in Ulpian's terms, again, their *dignitas* not their *fama*. This is another example of the way in which, to a certain extent, the English law of defamation has transformed itself into a common-law-style *actio iniuriarum*.

[136] *Response to an Objection*

At this point, an objection that could immediately be raised is: does it matter? Even if we do accept that defamation properly exists for, and only for, the protection of reputation, is it not pedantic at best, in a post-formulary age, to insist on the use of the 'right' cause of action? What would, after all, be wrong with defamation filling in the gaps left by the absence of direct protection of dignitary interests in English law?

The answer is that it does matter, for either of two reasons. When non-reputational considerations are smuggled into a cause of action, defamation, meant to be protecting reputation, one of two things happens. The first possibility is that protection will be granted

²⁰ *Kaye v Robertson* [1991] FSR 62 (CA).

²¹ *Tolley v JS Fry & Sons* [1930] 1 KB 467.

²² L. McNamara, *op. cit.* (n. 8), chap. 6.

which ought not to be. That reputation founded in character deserves to be protected—which is not to say that it could never be justifiably infringed—is self-evident; if challenged to give an account, the law would easily be able to explain why it does take such a course of action. But whether self-worth, for example, ought to be protected is much less obvious. This paper is not the place to answer the question; but the point can validly, and should, be raised. My position here would be that self-worth does not deserve, as such, to be protected; but it is right to render actionable such ridiculing words when they become harassing.²³ If this is true, then the use of the ridicule test amounts to giving self-worth a *free ride* in the reputational carriage, granting it protection under the law without requiring it to make its own separate case.

The second possibility is that the non-reputational (in this case, dignitary) interest does in fact deserve protection. Even in this case, it is at least possible that the use of the wrong cause of action will have unsatisfactory consequences. Some of these consequences might be indirect. For example, by allowing some bits of breach of privacy to be smuggled into the law of defamation and others into other causes of action, all in a piecemeal fashion, we are most likely to delay the coming into being of a coherent and principled body of law pertaining to the protection of privacy. We also encourage the perpetuation of injustices: for the fragmentariness of the protection, making it virtually impossible to treat like cases alike, will have the almost unavoidable effect of adding to, rather than subtracting from, the injustice of not granting principled protection to this interest in the first place.

Some consequences might be more direct. Let us take as an illustration the publication to the world at large of the serological status of an HIV+ person. I will leave open the question whether such disclosure without proper justification ought to be actionable. If we accept that it should be, the real reason is unquestionably because we consider that it violates the right of the plaintiff to control the disclosure of such private information: what he has been robbed of in a case like that is the ability to decide for himself whether, when and to whom the information should be communicated. From this, it follows logically that it ought to be irrelevant whether the information is true. If the concern is privacy, truth should evidently be no defence: the wrong does not consist in the spreading of a false (and hurtful) statement; and is unaffected by it. If, on the other hand, we frame the claim as an action in

²³ On what the author has called ‘the interest in an equal measure of respect’ and the protection against harassment, see generally P. Birks, ‘Harassment and Hubris: The Right to an Equality of Respect’, 32 *Irish Jurist (NS)* (1997), 1, esp. 28-44.

defamation, that is to say, as an action for the infringement of the plaintiff's deserved reputation, then by construction truth should be a defence—for a true statement about another cannot possibly injure his deserved reputation.²⁴ At this point, either of two things happens. Either truth is recognised as a defence, and the purpose of the action is defeated: the HIV+ claimant whose serological status has been broadcast to the world will be left without a remedy. Alternatively, something even more perverse might happen, which is that the law, unwilling to accept such a result, would make truth—simpliciter—irrelevant to the action *in defamation*.²⁵

[137] *The Rehabilitation of Offenders Act 1974*

This is what happened in England with the Rehabilitation of Offenders Act, which prohibited the defendant having—maliciously—published the past, now spent, convictions of the claimant from relying on the defence of justification.²⁶ If this happens, then the protection of the claimant is—rightly or wrongly—secured; but this comes at a heavy price, which is a severe distortion of the law of defamation. If defamation does, as it claims to (and should), protect deserved reputation and nothing but it, then it follows as a matter of logic that a true statement cannot be—and should not be—actionable in defamation.

V Defamation and Economic Interests: the Case of Slanders not Actionable *per se*

The third point requires us to step back in time to be understood. Originally, defamation in England was the province of ecclesiastical courts; it was actionable because it was sinful; and

²⁴ On the rationale of the defence of truth in terms of protected interests, see E. Descheemaeker, ‘“*Veritas non est defamatio*”? Truth as a Defence in the Law of Defamation’, 31 *Legal Studies* (2011), part III.

²⁵ This is the law for example in South Africa, where only truth ‘for the public benefit’ justifies. On the origins of the defence, and how it reflects the fact that South Africa really has a law of verbal injuries (*iniuriae verbis*) rather than of defamation, see E. Descheemaeker, ‘“A man of bad character has not so much to lose”: Truth as a Defence in the South African Law of Defamation’ (forthcoming). On the position of Scots law, which adopted the English rule in 1859 (*McKellar v Duke of Sutherland* (1859) 21 D 222, 227), see J. Blackie, ‘Defamation’ in K. Reid and R. Zimmermann (eds.), *A History of Private Law in Scotland*, vol. 2: *Obligations* (Oxford, 2000), 633, 666-71.

²⁶ Rehabilitation of Offenders Act (1974 c 53), s. 8(5): ‘A defendant in any such action [= *defamation action*] shall not ... be entitled to rely upon the defence of justification if the publication is proved to have been made with malice’. The term ‘malice’ is not defined by the Act; but Lord Diplock (who introduced the word in the Bill) made it clear during the preparatory works that he meant it in the sense defined by himself earlier that year in *Horrocks v Lowe* [1975] AC 135, 149 (HL Deb 24 July 1974 vol 353 cc1806-52 at 1812). This is the only exception known of English law to the principle that *veritas diffamationis excusat*.

the main remedy was excommunication of the defamer.²⁷ No money damages were, at least in theory, granted by the church courts.²⁸

It is only at the beginning of the 16th century that the king's courts started to grant redress for defamatory words. In order to justify their separate jurisdiction, parallel to that of ecclesiastical courts, the courts of common law insisted on the allegation of 'temporal' loss to the plaintiff. This 'temporal loss'—never clearly defined—appears to have been essentially *financial* loss, caused by the injury to reputation but distinct from it.²⁹ This is highly significant, because it means that, analytically, the common law of defamation was originally geared towards the protection of *economic* interests rather than reputation *per se*.³⁰ The paradigmatic case of defamation in the 16th or 17th century would have been a merchant who had been publically called a 'crook' in the marketplace, as a result of which he claimed to have lost customers and sought redress. What we have here is an injury to reputation, which is essentially ignored by the law, and then an injury to economic interests which is consequential upon the injury to reputation and receives monetary redress through the action for defamation.

Crucially, however, the allegation of temporal loss soon became non-traversable, meaning that such loss was conclusively presumed to have flown from the publication of the words.³¹ But this rule only applied to the words which were actionable at the time it was developed. These comprised written words (the category known today as 'libel') and such spoken words as had been held to be actionable, of which the main categories were: (a) the allegation of a serious crime; (b) words affecting the plaintiff in his trade or profession (typically imputations of professional incompetence or allegations of bankruptcy); and (c) words imputing a disease regarded as shameful, such as leprosy or syphilis. It is only in the early 17th century that other defamatory, spoken words became actionable under the action of trespass upon the case for words (slander). By that time, however, courts were no longer [138] content to presume the existence of temporal loss and started to probe into the allegations made by the claimant. As a result, if no 'temporal' loss was in fact proved, the words would yield no remedy—³² despite having, by definition, injured the reputation of the

²⁷ R. H. Helmholz, *Select Cases on Defamation to 1600* (London, 1985), xxxviii.

²⁸ *Ibid.*, xxxix.

²⁹ *PR*, 613. It is the precursor of what we would call 'special loss' today.

³⁰ This caused Pollock to hold—rightly—that English law 'has gone wrong from the beginning in making the damage and not the insult the cause of action' (F. Pollock, *The Law of Torts* (London, 1887), 210).

³¹ D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford, 1999), 116; *PR*, 613.

³² D. Ibbetson, *op. cit.* (n. 31), 123.

claimant. This is how the category known today as ‘slanders not actionable *per se*’ came into existence. The remarkable feature of this class for our purpose is that the defamatory words are *unactionable* unless and until the injury to reputation that they cause is accompanied by another type of loss. Loath as the law might be to admit this point, what this really means is that slander—defamation in a non-permanent form—does not in such ordinary cases protect reputation at all. It only protects (if through the mediation of defamatory words) the interests whose violation is redressed through the award of damages for consequential losses, in particular wealth.³³ Given the above proposition, taken as a starting point, that what the wrong of defamation exists for is the protection of reputation, this result is evidently absurd. The regime of this class of slanders ought to be aligned on that of libel—defamation in a permanent form—and slanders actionable *per se*. Defamation should exist for itself, as a way of remedying injuries to reputation (a type of personality rights), not as an auxiliary of the law of negligence to protect the financial interests of the plaintiff.

VI Defamation and Parasitic Interests: the Question of Consequential Loss

This proposition—that defamation exists, as a cause of action, to remedy injuries to reputation, and not as an auxiliary of other causes of action to protect economic interests—has another important consequence when it comes to the redress of *consequential losses*. The position in English law is currently that, once injury to the interest or interests primarily protected by a cause of action has been established—in the case of defamation, the injury to reputation—then (subject to the rules of remoteness) all other actionable losses flowing from it are recoverable as well, in particular financial losses. Thus, if I am publicly defamed and, as a result, suffer mental distress and also lose my job, I can obtain redress for these as well *in defamation*. Although the question is typically left unanalysed, its being regarded as coming to quantum of damages for the injury to reputation, what it really means is that the wrong of defamation also protects, obliquely, the corresponding interests (mental well-being and wealth).³⁴

This can be contrasted with the position of Roman law, as still visible in modern South African law. In South Africa, if I lose my job as a result of being defamed, I will need—at least in principle—to bring the *actio iniuriarum* to recover for the injury to my reputation

³³ *PR*, 616-17.

³⁴ *PR*, 615-16.

and a separate action, the *actio legis aquiliae*, to recover for the economic loss. This I believe to be a much more satisfactory approach from an analytical perspective, and also practically.³⁵ The reasons are similar to those expounded in section 3. The protection of various interests respond to different considerations, which often will translate into different rules pertaining to the redress of each of them. In English law, the recovery of economic loss, as a primary harm ('pure economic loss'), is severely limited—and rightly so. The recovery of mere emotional distress is normally impossible when it is the sole injury complained of. Why should recovery widen, or become possible in the first place, simply because the losses happen to stem from an injury to reputation? The distinction is arbitrary, and the result unfair: if there are good reasons to stop or limit the redress of such injuries in the law of wrongs, these ought not to be bypassed simply by categorising the losses as 'consequential' rather than 'pure'—a change of label which does not in itself justify anything;³⁶ if there are not, the law should be changed rather than piecemeal exceptions allowed to be smuggled in.

[139] The alternative is the same as above: either the parasitic interests do not deserve protection, and they should not be able to act as free riders; or they do, in which case the law should develop a coherent body of rules to ensure their protection. Besides, as pointed out earlier, rules appropriate to one type of loss need not be appropriate for the redress of another. This is particularly true when it comes to the *degree of fault* required to trigger the award of a remedy. In this respect, it is intuitive that injuries to reputation and injuries to economic interests need not, and oftentimes should not, attract the same standard of liability. A legal system like South African law is equipped to deal with this: the *actio iniuriarum* brought to redress injuries—among others—to reputation will require the proof of *animus iniuriandi*; while the *actio legis aquiliae* brought to seek compensation for consequential economic loss will be based on negligence (*culpa*). The English law of defamation, on the other hand, is not so equipped. Conflating these various interests under one cause of action, it will either make the recovery of one type of loss too easy, or conversely too difficult, by aligning it without

³⁵ Interestingly, the same approach has been advocated in the context of Scots law: see K. Norrie, 'The Scots Law of Defamation; Is there a Need for Reform?', in N. Whitty and R. Zimmermann (eds.), *Rights of Personality in Scots Law: A Comparative Perspective* (Dundee, 2009), chap 9.

³⁶ This was recognised scathingly, in a different context, by Lord Devlin: 'The interposition of the physical injury is said to make a difference of principle. I can find neither logic nor common sense in this. If irrespective of contract, a doctor negligently advises a patient that he can safely pursue his occupation and he cannot and the patient's health suffers and he loses his livelihood, the patient has a remedy. But if the doctor negligently advises him that he cannot safely pursue his occupation when in fact he can and he loses his livelihood, there is said to be no remedy. Unless, of course, the patient was a private patient and the doctor accepted half a guinea for his trouble: then the patient can recover all. I am bound to say, my Lords, that I think this to be nonsense' (*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, 517).

warrant on that of another—for example, the defamed plaintiff in a non-privileged situation will be able to recover for loss of earnings without any proof of fault at all, when typically such economic loss would require the proof of either *dolus* or *culpa* within a special relationship marked by an assumption of responsibility—or, alternatively, it will try to satisfy two sets of requirements at one time and thus end up in confusion. This, arguably, is what has happened to English law. One principal reason, in my mind, why the English law of defamation has been wavering for more than a century between malice-based, strict and negligence-based liability, without ever managing to reach a stable point,³⁷ is because it is trying to protect at one time interests which naturally attract different responses in terms of fault. Forced to lump them together and subject them to the same rules, it was almost bound to reach unsatisfactory results, and likely to keep changing its mind in an attempt to reach an impossible compromise—which it did. In order to remedy this, English law should stop granting, in defamation as elsewhere, stealthy redress for injuries to parasitic interests under the guise of quantum of damages for consequential losses. These losses should, if warranted (and only then), be redressed through appropriate alternative causes of action.

VII Conclusion

This paper has defended four propositions which, it was argued, flow directly (as a matter of logic, not opinion) from the recognition that the wrong of defamation protects reputation—deserved reputation—and nothing but it. This means that it ought not to protect obliquely privacy, self-esteem or other interests (in particular economic). For this reason, the supplementary tests of ridicule and ‘shun and avoid’ as to what constitutes defamatory matter ought to be removed from the law—which could be done judicially. Section 8(5) of the Rehabilitation of Offenders Act should also be abolished, which naturally would require Parliamentary intervention. The alignment of slanders not currently actionable *per se* on other defamatory statements would probably also require such intervention. The proposed reform would then pave the way to the abolition of the continuing distinction between libel and slander, which is no longer defended by anyone but has persisted to the present day. Finally, perhaps the most controversial proposition is the one pertaining to consequential losses,

³⁷ *PR*, 625-40.

which goes beyond defamation and would require a change in the way we *think* about the law: what it calls for is that the question of protected interests should finally, 250 years after Blackstone, be taken seriously and given, by English courts and scholars, the legal translation that they require and deserve.